No. 84-267

In The

Supreme Court of the United States

October Term, 1984

WILLIAM P. CLARK, et al.,

Petitioners,

vs.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Bureau of Land Management, in connection with its herbicide program, may disregard certain requirements of the National Environmental Policy Act of 1969 merely because the herbicides involved enjoy *pro forma* registration under the Federal Insecticide, Fungicide, and Rodenticide Act.

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STATEMENT OF THE CASE

Respondent and Plaintiff below, Southern Oregon Citizens Against Toxic Sprays, Inc. ("SOCATS") accepts the Statement of the Case (Petition, pp. 2-8), filed by Petitioners ("BLM"). The following augments that statement.

In its programmatic EIS the BLM admitted that wood-cutters, fishermen, hunters, hikers, and other users of the forest are expected to enter areas that have been sprayed with herbicides (App. 1). BLM further admitted that the herbicides can enter water supplies (App. 1). Numerous BLM records introduced in the trial court also showed that exposure of humans to herbicides can occur in unintended ways. Despite the "mitigation measures" envisioned by BLM, human exposure to herbicides in some dosage will occur.

In the district court, lengthy and detailed affidavits of SOCATS' toxicologists stated that it is now unknown whether there is a safe dosage of exposure to herbicides. Based on currently accepted data, science is unable to say that any threshold of human exposure exists below which genetic damage (e.g. cancer, mutations) does not occur.

BLM purported to disagree and to believe that low dosages of herbicides were safe. However, SOCATS learned BLM's chief affiant, Dr. Frank Dost. D.V.M., had himself earlier acknowledged that the existence of a safe threshold of exposure is uncertain. Based on the record before it, the district court thus made a finding that there is genuine scientific uncertainty about the health effects of herbicides and about the existence of a safe level of exposure (see Petitioner's App. 20a-24a). The BLM has not challenged that finding on appeal.

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REASONS FOR DENYING CERTIORARI

SUMMARY OF ARGUMENTS.

The Court should not grant certiorari. The circuit courts are correct and in agreement about how to treat

important scientific uncertainty under NEPA and how to interpret 40 C.F.R. § 1502.22. The circuit courts agree that the unlikelihood of the worst case occurring does not relieve an agency from disclosing scientific uncertainty, nor from analyzing the potential worst case.

40 C.F.R. § 1502.22, a binding CEQ regulation, does not exceed the mandate of NEPA. The plain wording of the regulation is fully consistent with prior constructions of NEPA by this Court and others.

The mere registration of particular herbicides by EPA, as contemplated by FIFRA, does not alter BLM's obligations under NEPA and 40 C.F.R. § 1502.22.

I. The Circuit Courts of Appeal Are Not in Conflict.

The Circuit Courts are in agreement about the meaning of 40 C.F.R. § 1502.22.

Aside from the Ninth, only the Fifth Circuit has construed this regulation, and that circuit agrees with the Ninth. In *Sierra Club v. Sigler,* 695 F.2d 957 (5th Cir. 1983), the Army Corps of Engineers proposed to build an offshore oil terminal. A catastrophic oil spill was possible. Scientists were uncertain of the effects of such a spill and resolution of that uncertainty was beyond the state of the art. The Corps argued it had no duty to comply with 40 C.F.R. § 1502.22 merely because it believed that a catastrophic spill was unlikely, that its probability was remote.[1]

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1. To paraphrase BLM's basic argument in this case: "We feel that herbicides are probably safe in low dosages. Therefore, we need not reveal scientific uncertainty on that issue nor analyze the potential worst case that could occur if we are wrong. We do not have to comply with 40 C.F.R. 1502.22."

In rejecting the Corps' argument, the Fifth Circuit said:

> [T]he fact that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis . . . [The Corps' interpretation] of the regulation and the Plaintiff's burden under it reads the regulation out of existence. . . . Remoteness does not bar a worst case analysis so founded and should instead be weighed by the Corps when it applies the worst case analsis in its decision making process.
>
> *Sigler,* at 974.

The Ninth Circuit agreed in the instant case, and it expressly followed the rule of *Sigler.* It repeatedly cited the *Sigler* decision and Fifth Circuit's interpretation of 40 C.F.R. § 1502.22 as the controlling authority.[2]

BLM asserts that the *Sigler* decision required SOCATS to "prove" a "real possibility of the occurrence" to trigger the duty of 40 C.F.R. § 1502.22. This argument by BLM distorts the *Sigler* decision, and misapplies that decision to the facts of this case. In *Sigler,* the proposal was to build an oil terminal; in this case, to spray herbicides. In *Sigler,* a foreseeable result was a major oil spill; in this case, an admitted result is human contact with the herbicides. In *Sigler,* the effects of a major spill were irresolvably uncertain; in this case, the effects on humans of herbicide exposure are likewise uncertain. The two cases are factually similar.

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2. *"Sierra Club v. Sigler* . . . [supports] the district court's decision here" (See Petitioner's App. 5a); "The district court holding here accords with [*Sigler*]" (See Petitioner's App. 6a); "After the decision in *Sigler,* the BLM had notice that its reading of 1502.22 was untenable" (See Petitioner's App. 11a).

To be sure, in both cases, the plaintiffs must and did "prove" something. In *Sigler,* the plaintiffs proved that oil spills were to be expected. In this case, the plaintiff proved that the public would be exposed to herbicides.

SOCATS does not seek discussion of frivolous possibilities, such as whether herbicides could harm the Bigfoot, if that creature exists. Such a meaningless discussion adds a second layer of uncertainty and is clearly beyond the ambit of NEPA. In this case, however, it is agreed and "proved" that herbicides will contact the public. The only uncertainty is about what might happen next, and about whether there is a safe threshold dosage of exposure.

As in *Sigler,* science is unable to answer this important question. Therefore, the BLM must acknowledge the scientific uncertainty and analyze the worst case, just as the Army Corps had to do in *Sigler.*

This is the obvious and plain meaning of 40 C.F.R. § 1502.22.[3] To somehow require either plaintiff to "prove" that the worst case will occur is to pervert the clear intent of the regulation. Neither the occurrence nor the non-occurrence of the worst case *is* provable; if it were, 40 C.F.R. § 1502.22 would not be triggered. This was the reasoning of the Fifth Circuit in *Sigler* and the

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3. The CEQ's own explanation of 40 C.F.R. § 1502.22 supports the Circuit Court, and refutes the BLM's interpretation. The CEQ has made it clear that § 1502.22 applies to low probability/catastrophic impact possibilities. *Forty Most Asked Questions Concerning CEQ's NEPA Regulations,* 46 Fed. Reg. 18026, 18032 (1981).

CEQ's interpretation of NEPA deserves "substantial deference" from the courts. *Andrus v. Sierra Club,* 442 U.S. 347, 358 (1979).

Ninth Circuit in the instant case. The decisions are in harmony and correct. Thus, though BLM would portray a conflict in the Circuits, that conflict is illusory and needs no resolution by this Court.

II. The Circuit Court's Interpretation of 40 C.F.R. § 1502.22 Is Consistent With NEPA.

The regulation at issue, 40 C.F.R. § 1502.22 merely codifies a long and solid chain of case law. NEPA has always required that agencies discuss and evaluate important uncertainty.

As early as the decision in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973), it was held that:

> [O]ne of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."

Id. at 1092.

In *Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir.) *vacated in non-pertinent part sub nom. Western Oil & Gas Assn. v. Alaska*, 439 U.S. 922 (1978), the circuit court stated, "One of the costs that must be weighed by decisionmakers is the cost of uncertainty—*i.e.*, the costs of proceeding without more and better information." *Id.* at 473. 40 C.F.R. § 1502.22 is merely an efficient mechanism to accomplish that weighing.

In *Baltimore Gas & Electric Co. v. NRDC*, — U.S. —, 76 L.Ed. 2d 437 (1983), the Nuclear Regulatory Commission had exhaustively studied the uncertain effects of the permanent underground storage of nuclear wastes. It had acknowledged this uncertainty, described the potential worst case (water seepage into bedded-salt repositories) and assessed the chances of the worst case occurring; in short, the agency had done precisely what 40 C.F.R. § 1502.22 requires. Though this Court properly declined to disagree with the NRC's substantive decision to proceed, it did hold that this underlying procedure of "consideration and disclosure [was] required by NEPA." *id.* 76 L.Ed. 2d at 447. It is therefore clear that 40 C.F.R. § 1502.22 merely implements what NEPA contemplates and does not exceed the mandate of NEPA. Thus, BLM's desire to remain silent as to potential effects it deems unlikely violates *both* NEPA and 40 C.F.R. § 1502.22.

Plaintiff freely admits that NEPA does not require discussion of all potential impacts, no matter how remote or frivolous. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974). However, as written and as interpreted below, neither does 40 C.F.R. § 1502.22 require such exercises in imagination. The regulation is self-limiting in that respect. Only scientific uncertainty which is "relevant" requires disclosure. 40 C.F.R. § 1502.-22. Only if unobtainable information is "essential to a reasoned choice," 40 C.F.R. §§ 1502.22(a) and 1502.22(b) (1), or is "important to the decision," must the agency publish a worst case analysis. 40 C.F.R. § 1502.22(b) (2).

The plain wording of the regulation thus places its effect squarely in the mainstream of NEPA. Frivolous concerns may be disregarded, but important and relevant

potential impacts must be scrutinized. It can scarcely be argued that cancer and mutations are not relevant or important.

Contrary to the BLM's assertion (Petition p. 22) this regulation will not require each agency to "develop and maintain a scientific staff" to do original animal test research on the effects of herbicides. One must remember that SOCATS does not ask BLM to solve the riddle of the safety of herbicides, but merely to acknowledge uncertainty and to describe the potential worst case. This requires no extra scientific staff, but merely the publication of a document and the exercise of candor.

The issue here is not the ultimate substantive question of the safety of herbicides, nor even the question of whether to use those herbicides, but rather the strict *procedural* compliance which NEPA has always demanded.

The regulation provides an efficient and streamlined mechanism for the consideration of scientific uncertainty, one that could actually decrease the burden on federal agencies devoid of a particular scientific expertise. An agency is given the option of publishing a worst case analysis. For this reason the only burden imposed by the regulation in the instant case is self-imposed. If BLM had merely complied with the plainly worded regulation and issued an adequate worst case analysis, it need not have missed a single day of spraying, regardless of the ultimate safety or hazard of herbicides.

III. The Registration of Herbicides Under FIFRA Is Irrelevant To This Case.

The BLM suggests that the fact that herbicides were registered by the Environmental Protection Agency under

the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 ("FIFRA") somehow negates NEPA, in whole or in part.[4] This is incorrect for several reasons.

First, as BLM admits (Petition, p.15), "EPA's registration of an herbicide is not a guarantee of safety to either man or the environment." FIFRA's standards for registration of chemicals are different and less primarily concerned with hazard to human health than is NEPA. A chemical may be registered under FIFRA merely if the benefits of its intended use outweigh its costs (including environmental costs). 7 U.S.C. §§ 136a(5) and 136(bb).

Since FIFRA calls for this balancing of costs and benefits before registration, it is possible that a registered chemical is highly hazardous to humans, but very efficient in its commercial use. It is likewise possible that the particular chemical was registered because it is of marginal benefit but is toxicologically benign.

Thus, at best, the mere fact of registration under FIFRA simply does not tell us much about the safety of a given chemical, since EPA's decision to register that

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4. In its Petition, BLM would characterize its attitude toward FIFRA registration as something less than complete reliance. ("We are not contending that FIFRA absolves the proposing agency, here the BLM, from conducting a thorough examination of the probable environmental impacts of its specific spraying proposal.") (Petition, p.16) However, the record in a related case shows that BLM's actual attitude is total reliance on FIFRA registration: "Simply stated, our position is: *that so long as herbicides are registered and approved for forestry use by EPA, BLM may appropriately use such chemicals within specified procedural safeguards.*" *Merrell v. Block*, 20 E.R.C. 1607, 1613, footnote 8 (9th Cir. 1984) *(citing BLM's Field Guide to Policies and Procedures Required for Vegetation Management with Herbicides in Western Oregon)* (emphasis in original).

chemical embraces many other concerns than safety. Even if FIFRA worked as Congress intended, it would fail to provide the "hard look" demanded by NEPA. *Kleppe v. Sierra Club,* 427 U.S. 390 (1976).

Second, and even more troubling, is the EPA's apparent failure to meet its duties under FIFRA as shown by unchallenged evidence in both the trial court and administrative records.

While this suit was in the district court, a special review of 2,4-D was completed by EPA. It showed "significant information gaps" on the effects of 2,4-D (a registered herbicide) "preventing a definite conclusion on the safety of the herbicide." (App. 2).

Further, a 1980 report from the General Accounting Office concluded that EPA's program of reregistration and reassessment of the safety of registered chemicals was then already hopelessly inundated with 35,000 registrations, which EPA had inherited from other agencies (App. 3-4). EPA was then behind schedule and could only "rubber stamp" existing registrations (App. 5-6).

To further aggravate the problem, in 1982, the Reagan administration began to cut drastically the EPA budget for FIFRA-related programs, including the registration review process (App. 7). BLM presented no evidence that the situation has improved.

Plaintiff's members repeatedly brought all this information to BLM's attention, but BLM continued to look no further than the mere fact of EPA registration.

Regardless of the nature of EPA's duties under FIFRA, EPA has not met those duties. Therefore, BLM's

reliance on EPA is misplaced and cavalier. EPA's practical problems of politics and budget simply prevent any conclusion that "registration means safety." The mere fact of *pro forma* registration of a particular herbicide does not remove uncertainty as to health effects when humans are exposed to that chemical. Existing registration, therefore, does not affect the strictly procedural obligations of 40 C.F.R. § 1502.22, nor cure BLM's failures to comply with that regulation and with NEPA.

CONCLUSION

For the reasons given above, respondent Southern Oregon Citizens Against Toxic Sprays, Inc.[5] asks that the Court deny the BLM's Petition for Writ of Certiorari.

Respectfully submitted,

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5. SOCATS is a non-profit Oregon corporation. It has no parent companies or subsidiaries. SOCATS is a member of the Southern Oregon Regional Council of the Northwest Coalition for Alternatives to Pesticides, Inc., an Oregon non-profit corporation.

This listing is provided under Supreme Court Rule 28.1.

APPENDIX A

(Excerpts from BLM's final EIS, *Vegetation Management with Herbicides, Western Oregon,* 1978; a complete copy has been lodged with the Court by BLM).

from p. 3-93

WATER

Herbicides may get into water supplies by direct application to previously undetected areas of free water, drift from adjacent areas, leaching in shallow soils, and movement of herbicides to streams by mass overland flow resulting from periods of intense precipitation occurring shortly after application. These sources could introduce low levels of herbicides for short periods of time leading to a brief exposure of aquatic organizms (sic) or other water users in the immediate area. However, no measurable adverse impacts to organisms from these low levels have been identified.

from p. 5-3

The possibility exists that wood cutters, hunters, fishermen, hikers and berry pickers will cross through or be in areas proposed for herbicide treatment or treated with herbicides.

APPENDIX B

(Excerpt from an EPA news release, April 21, 1980. This news release is part of the trial court record.)

> Barbara Blum, Deputy Administrator of the U.S. Environmental Protection Agency, announced today that the Agency is requesting additional information from manufacturers to determine whether 2,4-D, a widely used herbicide, is safe for humans and the environment. "We have made this decision following a review of health effects studies of 2,4-D," Blum said. "The review showed that significant information gaps exist on the effects of 2,4-D, preventing a definite conclusion on the safety of the herbicide."

APPENDIX C

(Excerpts from a report by the Comptroller General of the United States entitled: *Delays and Unresolved Issues Plague New Pesticide Protection Programs,* February 15, 1980. This report is part of the trial court record.)

from p. 2

> On September 28, 1978, the Chairman, Subcommitte on Health and Scientific Research, Senate Committee on Labor and Human Resources, asked us to review several pesticide regulatory programs. The review was made because of his interest in the status of EPA's efforts to protect the public from potentially hazardous pesticides. The Chairman was concerned because our 1975 report on Federal pesticide registration . . . and a report of the Sub-committee on Administrative Practice and Procedure, Senate Committee on the Judiciary, disclosed that EPA needed to significantly upgrade its pesticide programs before they could be relied on to protect the public and the environment from exposure to hazardous pesticides.
>
> As agreed with the Chairman's office, our review concentrated on two fairly new pesticide programs—registration standards and rebuttable presumption against registration (RPAR). The former was designed to thoroughly reevaluate the safety of the estimated 35,000 pesticide products which the Government had registered during the last three decades. The latter, EPA designed to identify certain high-risk pesticides and, after public and industry input, to undertake risk/benefit analyses to determine whether the pesticides identified should be canceled, placed under restricted use, or left alone.

from p. 4

> After several false starts, dating back to 1975, EPA finally began in 1978, a registration standards

program to reassess the safety of the 35,000 pesticide products and their accompanying tolerances which the Government had registered (or approved) over the past three decades. The task is not easy. Registration standards will be a long and costly program spanning up to 15 years, involving hundreds of EPA and contractor personnel, and costing as much as $200 million. Although it is too early to predict the program's chances of success, the program is already 5 months behind EPA's schedule and has many other problems which must be corrected if it is to be effective in assuring that only reasonably safe pesticides are used in this country.

from p. 5

In a related matter, EPA has not finished examining the adequacy of its tolerance-setting procedures—something it first promised back in 1975. Until it thoroughly completes this task and tolerance reevaluations under registration standards, EPA cannot assure the public that tolerance levels are reasonably safe.

from p. 5

The registration standards program evolved from EPA's early failure to conduct an effective pesticide reregistration program. Under the 1972 FIFRA amendments, EPA was required to reregister, by October 21, 1976, the 35,000 pesticides previously registered by the Department of Agriculture (prior to December 1970) and EPA. Amendments in 1978 reaffirmed the need for the expeditious reregistration of pesticides but deleted the deadline requirement.

During 1975, two EPA officials started reviewing Agency files to determine whether required safety data was present. In May 1976, EPA formally established a task force to continue this reregistration effort. However, EPA officials mistakenly assumed that most of the data was scientifically valid. Accordingly, reviewers skimmed through the files to de-

termine whether data existed but generally did not review the data's quality.

An EPA official told us that this early attempt was a "rubber stamp" approach to reregistration. He also told us that EPA took this approach because of statutory time constraints and because EPA did not have sufficient resources to conduct a thorough reregistration program.

In August 1976, EPA, because of the criticism it was generating, halted its reregistration program without reregistering any pesticides. A summary of this criticism appeared in a March 1977 EPA report entitled, "FIFRA: Impact on the Industry"

"* * * Senate hearings, discussions with GAO and FDA concerning the reliability of certain data submitted to FDA, and a subsequent preliminary report of an independent toxicologist on a sample of pesticide data raised serious doubts about (1) the adequacy of the testing [data] in EPA files, and (2) the completeness of the Agency's own review and follow-up. Since then, in December 1976, the staff of the Senate Subcommittee on Administrative Practice and Procedure has issued a report stating that the Agency has, in fact, been negligent in its public duty by not reviewing all data in depth prior to reregistration."

EPA officials met several times in August 1976 to discuss the need for a more comprehensive reregistration program to overcome the deficiencies of the one just terminated. In September 1976, several officials proposed a plan to establish such a program and suggested that a permanent staff of about 60 scientists and program managers have responsibility for it. EPA management endorsed the program but failed to provide the staff to operate it.

In February 1977, pesticide officials presented another reregistration plan to EPA management to be carried out by a staff of about 90 people. This plan

was also not implemented, and the reregistration task force operated with a small staff until its demise in July 1978.

EPA began planning for what is now known as the registration standards program in 1977. EPA realized it needed to change its narrowly focused strategy toward reregistration and decided to (1) thoroughly reevaluate all health and safety data in its files and all published literature relating to a pesticide's uses, (2) restructure its reregistration program to concentrate on the estimated 514 active chemical ingredients in pesticides, instead of considering the merits of each of the 35,000 pesticide products separately, and (3) reassess the safety of the estimated 6,000 tolerances on food and feed products which the Government had approved over the last 30 years.

from p. 8

According to EPA officials, important health and safety studies for many of the registration standards pesticides are missing, precluding EPA from developing final registration standards and from unconditionally reregistering all pesticides. Therefore, EPA plans to issue interim registration standards on many pesticides and plans to direct the applicable pesticide firms to fill data gaps by locating or performing required studies and submitting them to EPA for review.

from p. 9

As of September 1979, EPA was already 5 months behind schedule in developing the first group of registration standards. Delays cost money and prevent EPA from reaching timely conclusions on the safety of previously registered pesticides. As a result, the public may be exposed to hazardous pesticides longer than necessary.

APPENDIX D

(Excerpts from Article, *Toxic Substances, Pesticides, and Hazardous Materials Highlights of President Reagan's Proposed Fiscal 1983 Budget,* Chem. Reg. Rep., February 12, 1982 (B.N.A.) This article is part of the trial court record.)

A 12 percent cut in Environmental Protection Agency staffing and funding for fiscal 1983 was proposed Feb. 6 as the Reagan Administration sent to Congress a budget request termed "tighter and more efficient" by an EPA official.

The $961.3 million operating budget requested by the President would be about $1.25 million, or 12 percent, lower than EPA's fiscal 1982 operating budget and $336 million, or 29 percent, less than the fiscal 1981 operating level.

The budget proposed cutting the toxic substances program by $8.8 million to $68.6 million, the pesticides program by $2.5 million to $50.8 million, and research and development activities by $62 million to $216 million.

The agency's full-time personnel level for fiscal 1983 would be 8,645, down 1,176 from fiscal 1982, with the toxics program losing 79 full-time employees, the pesticides program 84 employees, and research and development 251 employees. . . .

The fiscal 1983 budget proposal would significantly reduce funding for pesticide programs, bringing a fourth straight year of declining staffing levels for those programs. Staff levels in this area would be cut to 661 full-time positions—less than two-thirds of the 1,017 positions authorized in 1980. Funding would decline to $50.8 million, a 21 percent drop from 1980 levels.

For 1983, the major cuts come from:

The state grant programs. The Administration proposes to cut $1.8 million from enforcement grants and $500 million from certification and training grants. The enforcement cut would be offset by improvements in state priority setting that will "direct available resources to aspects of pesticides use that do the greatest harm," the agency said. States will be encouraged to impose fees to offset the cuts in certification and training funds.

The registration review process, where $558,000 and 35 staff positions would be cut. The EPA budget summary said the review process would be "streamlined to obtain strict adherence to legislative and administrative deadlines."

The registration standards development program, which would lose another 10 positions, but increase its efficiency, concentrating on "classes of pesticides with high exposure and potential hazard," the agency stated.